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Opening Address

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CANADA-UNITED STATES LAW INSTITUTE 40TH ANNIVERSARY CONFERENCE, APRIL 2016: OPENING ADDRESS

*Sidney Picker, Jr. **

It is my very real pleasure, as the founder of the Canada-United States Law Institute (“CUSLI”) and it’s first U.S. Director, to open this 40th Anniversary Celebration on the occasion of the Institute’s Annual Conference (called the “40th Anniversary Conference on Cooperation and Conflict: International Trade, Investment, & Cross Border Disputes.” That pleasure in large measure stems from the fact that, after 40 years, now retired and an octogenarian, I find myself still vertical. More to the point, so is CUSLI, and in recognition of that occasion I have been asked, to paraphrase the physicist Stephen Hawking, to reflect on those 40 years by giving “A Brief History of CUSLI’s Time.” However, I have chosen instead to narrow that topic to “The Big Bang of CUSLI”, that is, why and how CUSLI came to be, and note briefly what it looked like during and immediately following launch. After 40 years many people are broadly acquainted with it activities thereafter, but few remain alive who recall how this all began.

Following my remarks, I have also been asked to present an award which I am embarrassed to say has been named after me, the so-called “Sidney Picker, Jr. Award” to this year’s recipient. Given who that recipient is this year, Rosemary Ann McCarney, it is my special honor to do so, particularly because, as will be clear when I introduce her, she was also a part of CUSLI’s “Big Bang.”

The pre-bang beginning requires disclosure that I came to Case Western Reserve Law School (“CWRU”) in 1969, hired sight unseen from Australia where I was on a one-year Fulbright Grant to research Pacific Basin Trade after having worked in the U.S. Government for what today is the United States Trade Representative on the then Kennedy Round of General Agreement on Tariffs and Trade (“GATT”) Trade Negotiations. CWRU felt compelled to add a full-time international law faculty member if it aspired to national law school status. Not all my colleagues were pleased with assigning a precious faculty position to international law, an area some called “cosmopolitan slumming” and others believed ranked right up there with the Easter Bunny and the Tooth Fairy.

Nevertheless, I happily slumped through the first three years teaching International Law and International Trade when in 1972 the American Society of International Law (“ASIL”), anxious to branch out from Washington-based activities and increase involvement nationwide, initiated a program of regional conferences around the country. They called and asked if I would organize one

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such in Cleveland. “Great,” I said. “Post-Kennedy Round GATT” or “Pacific Basin Trade”, areas I knew. “No,” said they, “Something more relevant to your region, to Cleveland.”

I recall exclaiming to my secretary, “What international could I possibly do that related to Cleveland? We’re in the middle of the country; nothing foreign in sight!” “Wrong,” she said, all I had to do was fly across Lake Erie to find a foreign country. “That’s not a foreign country”, I cried. “That’s Canada!” What followed can best be termed a “lightbulb moment.” Having “seen the light” I had enough sense to realize I knew nothing about Canada, and therefore nothing whatsoever regarding an appropriate conference topic. Fortunately, following a quick consultation with a local telephone directory, starting my search with the word “Canada”, I discovered that there was then a Canadian Consulate here in Cleveland. I called, and to my delight the then Consul, Allen Kilpatrick, was thrilled at the idea that a local university would want to do something Canadian, and he happily agreed to meet with me. Out of that and subsequent meetings emerged not only a friendship but the topic for a conference on “North American Energy Development” which he helped me organize and obtain qualified academic and government speakers. Even more helpful and more surprising, together we packed the house; the one-day conference was a success.

So pleased was the ASIL that it asked me to repeat the performance the following year, and that same Consul encored his assistance. By then I’d learned enough to know that Canada was not only a foreign country but perhaps America’s most important foreign country. It ranked as the Number One trade and investment partner of the United States (and vice versa), so I chose a topic this time closer to my international trade law professional background, “Canada-United States Trade Relations”. That conference proved an even bigger success than the year before.

Organizing those two conferences made me realize that most Americans know almost nothing of Canada’s culture beyond red-jacketed Mounties. By contrast most Canadians know much more about the United States, but not as much as they think they know. That knowledge is deep but selective; there are gaps. And what they know is filtered through the lens of unease a mouse might feel living next to an elephant; even the kindest of elephants requires constant vigilance.

In more substantive terms, two years and two conferences did not make me an expert on Canada, but it did make me aware of how foreign Canada was. Notwithstanding the obvious commonality of the two countries, notwithstanding the similarity of the various regions of both countries from west to east, notwithstanding how similar the people looked and often (Quebec and “outs and abouts” aside) sounded, each was, in national terms, fundamentally different. Though complex, the difference can perhaps best be summarized by our core slogans. In the United States that is the individual-oriented “Life, Liberty and the Pursuit of Happiness”. Canada’s is the more socially focused “Peace, Order, and Good Government.” In the United States the individual is made the centerpiece of society, and, being distrustful of government, the United States established both separation of power and checks and balances to assure as little interference with the individual as possible. In Canada, by contrast, social values form the

centerpiece of society, and while there is deep respect for the rights of the individual there is a fundamental confidence that governance can be trusted ultimately to do the right thing, periodic interim errors notwithstanding. These differences, stemming from revolutionary versus evolutionary routes to sovereignty, develop different legal approaches to addressing similar social, political, economic and cultural issues which provided fertile opportunities for a comparison of legal solutions.

Not only did I become aware of how foreign Canada and the United States were to each other I became acutely aware that each was the single most important and influential foreign country to the other, at every level - geographic, strategic, economic, financial, social, political, cultural, and ecological. Nevertheless, no legal pedagogical institutions developed any programs in either country to explore or examine the web of legal relationships binding the two countries to each other.

In particular, U.S. law schools had foreign study programs covering all parts of the world, e.g., the then European Economic Community (now the EU), East/West studies to deal with legal aspects of the then capitalist/communist divide, U.S.-Latin America studies, Africa studies and the like, but no U.S. law school had any program devoted to Canadian legal studies. Yet to do so seemed so natural for two reasons. First, for comparative law purposes: Two different legal systems address similar developmental problems, but not so extremely different as to be difficult for students to comprehend, and (French in Quebec notwithstanding) no language barrier; students and faculty have ready access to all the requisite legal literature of the other. Second, there was a clear need for an American law school to offer a framework to examine legal aspects of the Canada-United States complex of international/transnational relationships - political, strategic, social, economic - the works.

After examining the various foreign study programs of other U.S. law schools for models, I realized that these were exclusively *American* law school programs. The foreign program was put under an American law school's microscope. Without intending to do so these programs therefore bore a patronizing cast and seemed singularly inappropriate in the case of Canada, especially as I became convinced that Canadian legal education would equally benefit from a U.S. legal studies program. Hence, I contemplated not a unilateral program of an American law school out rather a bilateral or joint program under the auspices of an American and Canadian law school acting together, in partnership.

Hence, the core of CUSLI, with twin objectives: (1) to explore international legal aspects of the complex of relationships between the two countries, and (2) to use each other for comparative law purposes. This latter seemed ideal because, while the 2 countries shared geography, history, and fundamentally similar socio-political and economic values, each arrived at different constitutional and legal solutions to address the problems they saw - just different enough to be comparative-law interesting, but sufficiently similar so that it wouldn't cause culture shock to students and faculty on both sides of the shared border.

I accordingly drew up a draft of programs which could be undertaken by both law schools, including: (1) semester-long exchanges of student for full credit

academic credit at the sending law school; (2) exchanges of faculty in every discipline both for brief visits to provide comparative input into the full panoply of courses the receiving law school offers, and also at least one semester per year the exchange of a faculty member to offer a course in the receiving law school or teach joint selected Canada-United States comparative seminars on selected topics; (3) the publication of an international law journal devoted exclusively to the Canada-United States relationship; (4) sponsorship of scholarly research relating to that relationship and/or a comparison of legal solutions to similar problems (with resulting publication in the proposed Journal); (5) sponsorship of periodic conferences on legal aspects of the Canada-United States relationships or comparative law, both to educate the broader bar in both countries as well as scholars, and to bring together professional participants from both countries.

The name “Canada-United States Law Institute” flowed from the concept but was inspired by my wife, Jane Picker, who, having started a U.S. nonprofit organization to litigate sex discrimination issues, gave it the most descriptive and presumptuous name she could think of, “Women’s Law Fund.” The name was descriptively accurate, and it started with the word “Women” on the theory that any interested uninitiated person might, in those pre-computer days, consult the phone or similar index-oriented book, and the most logical word to start with was “Women.” In my case that word had to be “Canada”, and hyphenating it with “U.S.” sent not only the “equal countries” message but also captured the field from sea to sea to sea; no regionally restricting name for us. The word “Law” indicated its focus, and the word “Institute” was meant to sound presumptuous, sufficiently stuffy and permanent to be taken seriously. It also sounded both unique and pronounceable by its initials, CUSLI.

With a name and a program outline in place the next subject for consideration was a partner. Two criteria restricted my search for a mate. Though Canada may be a bilingual country, the United States was not; the contemplated exchanges would work only if both participating law schools spoke the same language. Furthermore, to hold costs to a minimum and maximize opportunities for travel back and forth the participating Canadian law school needed to be geographically close to Cleveland where CWRU is located. That meant the Canadian partner must be Anglophone and in Ontario.

Stage One for implementing the plan involved determining if any Ontario law schools would be interested. Following a preliminary discussion with my then-dean, Lindsey Cowan, who green-lighted in principle the broad concept of establishing such an institute at CWRU provided funding could be found, I met again with Cleveland’s then Canadian Consul. He enthusiastically embraced the idea, offered his good offices, and together we co-opted the attention of the Canadian Embassy in Washington which was anxious to support all opportunities for increasing an awareness of Canada in the United States. While there was an umbrella U.S. academic organization the Embassy supported, ACSUS (Association of Canadian Studies in the United States), covering all university disciplines, none was then in law. Hence, upon the recommendation of the Consulate, the Embassy awarded me a \$750 travel grant to visit Ontario law

schools in order to determine possible interest. I accordingly visited five such schools. Two responded positively.

While my then dean trusted me acting alone to initially investigate candidate Canadian schools he was not about to do so for an actual commitment. Hence, Stage Two required faculty approval. Besides, if this program were really to function as planned it was going to involve broader faculty cooperation and participation. Hence, following such approval the CWRU faculty then designated an ad hoc committee of myself and a half-dozen colleagues (plus one student) to visit the two Canadian law schools which expressed interest in principle in order to assess the possibilities and particulars. The Canadian law schools in turn formed similar committees to visit and assess CWRU.

Following such exchanges of visits, one of those two law schools suggested we implement aspects of the plan for a one or two-year trial period before deciding whether to establish a more formal institute. While that proposal seemed reasonable I was concerned that “living together briefly without benefit of marriage” was sufficient time to find the warts and make mistakes while losing sight of the long-term benefits. Without a “marriage” commitment we might more readily break up rather than patch up, but with a marriage - that is to say, an ongoing institutional commitment - we would modify the default position and correct whatever problems inevitably arise in the break-in years and make the marriage work. The second law school, the University of Western Ontario (“UWO”), was willing to make that institutional commitment, and it was in this manner that CWRU and UWO in 1975 agreed jointly to establish CUSLI.

The next job was to budget the endeavor and find funding. Costs could be minimized by such devices as faculty and student swaps being a wash, and in those days there were inexpensive nonstop Cleveland-London Air Canada flights. Still, making the plan operational required funding which the universities themselves lacked.

Foundations were the logical choice, but to make a new program with no track record look respectable required more than a presumptuous name. A material indication of government start-up support would help. Again I turned to the ever-supportive Canadian Consul in Cleveland. He steered me again to the Canadian Embassy in Washington which offered \$1,000 as a start-up grant. While not the amount I hoped for it was not the “no” I feared. With that commitment we went to the U.S. Embassy in Ottawa and explained that the Canadian government has already agreed to make a gift, so in keeping with the bilateral nature of the proposed Institute, we asked that the U.S. government also participate. The Embassy never asked how much the Canadian government gave, and we didn’t volunteer that information. It found \$25,000 in funds earmarked for “1976 Bicentennial Celebrations” and awarded it to us on the ground this was a more constructive use of funds meant to honor the 200th birthday of the United States than a fireworks show in Ottawa. With that gift I went back to the Canadian Embassy in Washington, explained that the American government gave \$25,000, and, again in keeping with the equal bilateral nature of the Institute, would the Canadian government now consider an additional gift of \$24,000 to make the

contributions equal? It did, and with a total of \$50,000 from two governments we now looked respectable, responsible and professional.

With by-governmental support in hand I then approached private foundations, the most important of which was the Canadian-based William H. Donner Foundation which had offices in New York. I bought a ticket on United Airlines to fly to New York to explain the program. As I boarded the plane United passed out a survey to its passengers, the purpose of which was to assess how often and where they fly. En route I read it carefully. How often do you fly within the United States? To Latin America? Across the Atlantic? the Pacific? the Indian Ocean? Those survey questions together covered every part of the globe except Canada and Antarctica.

When the plane landed I pocketed the survey, taxied to Donner, and when asked if there was a need for CUSLI I preceded my more prepared substantive speech by producing the United survey saying that if America's (and the world's) largest airline, which United then was, doesn't know that Canada exists, there is a problem. Donner accordingly awarded us a \$95,000 grant and with others from both sides of the border, including the Cleveland Foundation, the Gund Foundation, the Ontario Bar Foundation, and the Richard Ivey Foundation, we had sufficient funds to launch the program in 1976.

In keeping with its bilateral and binational conception CUSLI was formally opened in the Fall of 1976 with high-profile twin ceremonies, first at CWRU with the Hon. J.H. Warren, Canadian Ambassador to the United States as principal speaker, and a month later at UWO with the Hon. Thomas Enders, American Ambassador to Canada, as principal speaker. Structurally each law school adopted the curriculum and faculty of the partner law school and organizationally, in keeping with its joint nature there were two directors, one at each campus to organize and administer the various activities contemplated. I was U.S. Director at CWRU while UWO's Prof. R. Jack Roberts served as Canadian Director. Coordinating regularly together we arranged both two/three-day faculty exchange visits for a variety of specific courses as well as school-wide open guest lectures on broader topics. We also organized for-credit semester exchanges of students, two from each school in the first year. In its first year CUSLI also established a Public Advisory Committee composed of distinguished jurists and practitioners in both countries to advise and assist in the development of CUSLI activities.

By year two we increased the number of students exchanged to a maximum of six from each law school. In addition to the brief faculty exchanges and guest lectures a once each year semester-long faculty exchange was inaugurated when CWRU Prof. Ronald J. Coffey offered a course in U.S. Securities Regulation at UWO in the Fall and UWO Prof. Bruce Welling offered both a course in Canadian Income Tax at CWRU as well as co-teaching with his CWRU counterpart, Prof. Leon Gabinet, a Comparative Tax Policy seminar. In addition, CUSLI awarded its first Institute-sponsored research grant, to CWRU Prof. Lewis Katz who examined police practices in the United States and Canada, with and without an exclusionary rule of evidence, respectively. The project involved the cooperation of the police departments of Toronto and London as well as Cleveland. The resulting article,

together with later articles similarly supported by CUSLI grants, was published in CUSLI's newly established Canada-United States Law Journal.

In addition to its other activities CUSLI undertook organizational and administrative responsibility for the pre-existing Niagara International Moot Court Competition. Till then the so-called "Niagara" had consisted of an ad hoc collection of miscellaneous law schools on both sides of the border - most in the Great Lakes region - who annually put together an International Court of Justice ("ICJ") moot court. CUSLI institutionalized "Niagara," providing a home by regularizing its process and rules, and drafting ICJ problems using hypothetical disputes only between Canada and the United States. And law school participation broadened beyond the Great Lakes region.

In those initial years CUSLI also undertook sponsorship of conferences and workshops, either alone or in conjunction with bar groups in the United States and Canada, on a variety of subjects. Prominent speakers proved easier to obtain than first imagined; in addition to the ongoing assistance of the Canadian Consul in Cleveland I had by then learned that Canadians liked to speak in the United States because the Canadian press produced wider coverage of its citizens' remarks when speaking abroad, and then with Canadian speakers onboard American counterparts felt compelled to participate. Mirror logic worked for conferences organized in Canada. Of these conference in the early years the one worth noting, the most intellectually exciting, was a Comparison of the Role of the Supreme Court in the two countries, held in 1979 at CWRU. Contemplating the participation of a Supreme Court justice from each country I remembered the lesson learned when we obtained that \$50,000 from the U.S. and Canadian governments. I accordingly started with the Canadian Supreme Court and readily obtained the agreement of then Associate Justice (later Chief Justice) Brian Dickson to participate. With that I called Associate Justice Potter Stewart, the U.S. Supreme Court justice responsible for overseeing the U.S. 6th Judicial Circuit, where Cleveland was located, and told him he couldn't possibly say no inasmuch as his Canadian counterpart already said yes. He ultimately agreed, and the two justices spoke on a special two-person panel opening the conference with Harvard Constitutional Law Professor Larry moderating. Aside from the substantive dynamic that panel generated the high point for all who attended was when Justice Dickson stated that in preparation he'd researched the background and found that our CUSLI conference was the first time in the history of the two countries that there was any formal program to compare the role of the two supreme courts and also the first time that members of the two Supreme Courts ever participated together in a substantive program. In other words, ours was a first not only for its subject matter but for bringing together justices from the two courts.

As almost everyone at this conference knows in the early '80s I returned to my full time academic duties and persuaded Henry King, then just retiring as International Corporate Counsel at TRW in Cleveland, to succeed me as U.S. Director. He was supremely qualified, having served as Chair of the International Section of the American Bar Association and also co-chair of the joint American Bar Association/Canadian Bar Association committee. Henry was already an

adjunct member of the CWRU faculty, and he was a member of CUSLI's Public Advisory Committee since its inception. He was the perfect successor as U.S. Director. And it was Henry who, among other activities, inaugurated the concept of an "Annual Conference" focusing in depth on various aspects of the Canada-U.S. economic relationship. Henry's conferences became a thing to behold; he ran them the way the Swiss run watches, and he built them with the same precision, demanding thorough preparation of both his participants and attendees. The proceedings, both written preparatory materials and transcripts of oral interaction, were published annually in the Canada-United States Law Journal. Henry at the helm was sufficient reason for globally recognized experts in the public and private sectors of both countries to happily accept his invitations. Those conferences made a special kind of history, and though he is now gone they continue to this day.

So much for the "Big Bang", or how CUSLI began and what it looked like in those first moments following birth. For conception and birth in 1976 I was thinking of programs and activities in terms of 20th Century 1970s issues. CUSLI is now 40, mature, and operating in not only another century but another millennium. It is time to look to its future.

I was asked recently what issues CUSLI should now consider. I fumbled with issues which seemed relevant or ripe, such as: The effect of global warming on North America's environment and resources? An exploration of the consequences of the increasingly navigable and exploitable Arctic? Comparisons of Canadian and American perspectives regarding third countries or regions, e.g., relations with China and the Pacific, the EU, or the Middle East? Or perhaps, given the current U.S. elections, the common border - Opened? Closed? Cemented?

Ultimately, however, I concluded this was not my business. It is now 2016, not 1976 and this Institute is like the child who's now grown up. The parents let go, and the offspring flies solo. It is time for a younger generation to take this Institute, assess its place in legal education and the broader legal community, reconsider its goals, objectives and methods, and then recast it in whatever direction that generation thinks appropriate. And it is time for me and my generation to sit down and let that happen.

I now come to the second reason I was asked to speak this evening, and that is, to present this year's recipient of the "Sidney Picker, Jr. Award." This award was established by CUSLI in 2013 without my knowledge or consent. (Had I suspected an award might someday be given in my name I would have changed it to something more cosmetic and topical, such as Barry Broadborder.) The award is meant to recognize a person who has, pursuant to the goals of the Institute, made a significant contribution to the betterment of society.

This year's recipient, Rosemary A. McCarney, has certainly done that. After a lifetime career in public service in Canada, the United States, and around the globe she is currently Canada's Ambassador and Permanent Representative to the Office of the United Nations and to the United Nations Conference on Disarmament, based in Geneva. It is particularly poignant that the recipient of this award on the occasion of CUSLI's 40th Anniversary is an ambassador as this

brings full circle CUSLI's birth when 40 years ago, as you may recall, a pair of ambassadors formally opened CUSLI at its two partner law schools.

You may also recall from my earlier remarks that I referred to this year's recipient as a part of CUSLI's "Big Bang" and uniquely special to me. That is because she was one of the first two UWO students sent to CWRU on the inauguration of the semester-long student exchange portion of the program in 1976-1977, having been advised by her then boyfriend (now husband, Barry Fisher) to apply. Fisher was the student member of that UWO faculty/student exploratory committee I referred to earlier which visited CWRU in its investigative stage, and though he would graduate before the program began, he urged Rosemary, a year behind him and therefore eligible for the student exchange, that she had to apply.

I recall telling her on her arrival at CWRU that I hoped she would speak out in classes because in that way not only would she have a fulfilling comparative law experience but so would her American classmates who would be exposed to fresh new legal perspectives. Little did I realize how unnecessary it was to give that speech.

How to describe Rosemary's impact? Strong of opinion? Loud of mouth? A Mack Truck with curly hair? My colleagues would come into my office asking, "Who *is* that woman?" In each class her hand shot up like a semaphore as she would say, "We don't do it that way in Canada!" Whether he/she wanted to or not the faculty member was forced to ask how they "did it" in Canada which would then promote a policy discussion of the merits of the American or Canadian legal solution to whatever the problem was. It prompted precisely the debate between the students (and faculty) I had hoped when planning the program. (Oddly, during the course of the semester Rosemary became increasingly taken by American legal solutions or approaches whereas many of her American classmates became "Canadian.") She had the same affect on faculty. It was because of her voluble expressions of Canadian perspectives in his Criminal Law class that CWRU Professor Lewis Katz was stimulated to write the Comparative Police Practices article, referred to earlier, for the newly established Canada-United States Law Journal.

So successful was Rosemary that, several years later, when I concluded in those pre-Henry King days that I needed some assistance in administering the Institute, Case's Dean Lindsey Cowen agreed to create the position of "Institute Coordinator". Based at CWRU but meant to provide administrative leadership for programs at both CWRU and UWO, it was also a half-time teaching at CWRU, and I engaged Rosemary for the job. By then she had returned to Canada, graduated UWO, finished articling in Ontario and worked long enough with a Canadian firm to consider a cross-border change. In addition to her invaluable administration skills she taught dynamic courses in Comparative Criminal Law and Comparative Constitutional Law/Federalism.

In due course Rosemary then returned to Canada and developed a remarkable high profile career in public interest projects which took her all over the world, climaxing with her position as President and CEO of *Plan International*

Canada, one of Canada's largest and most respected charities devoted to social justice for children worldwide. She held this position until her appointment in 2015 to her present position as Canada's representative to the United Nations based in Geneva with the rank of Ambassador. In addition to her other professional accomplishments Rosemary is a renowned author of children's books designed to charm while expanding the opportunity horizons of children, regardless of gender, faith, race, origin, or disability. It is my special pleasure, therefore, to present this year's "Sidney Picker, Jr. Award" to Ambassador Rosemary Anne McCarney.